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IN THE

Supreme Court of the United States.

October Term, 1903.

No. 592 /93.

HANNAH O'CALLAGHAN and EDWARD CORCORAN, Appellants,

vs.

TERENCE O'BRIEN, as Administrator of the Estate of JOHN SULLIVAN, Deceased, and MARIE CARRAU, Respondents.

BRIEF IN OPPOSITION TO MOTION FOR WRIT OF CERTIORARI.

W. F. Hays,
John H. Mitchell,
Attorneys for Respondents.

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The application for certiorari to the United States Circuit Court of Appeals is made for the sole reason that petitioners "doubt whether the right of appeal exists."

The decision of the Circuit Court of Appeals is final.

Ayres *vs.* Polsdorfer, 187 U. S., 585;

Act of March 3, 1891, (see 517 par. 5, 26 Stat., 828).

The Court having been met at the very threshold with two questions, as shown by the bill, (Rec., Vol. 1, pp. 6-21, incl., 29-32, and 64-79, incl.) ~~either or~~ both of

which are inimical to Federal jurisdiction: (1st) the subject of the litigation was a probated will, and an estate being then administered in the Probate Court of the State of Washington, *a court having exclusive jurisdiction of the subject-matter;* (2d) the jurisdiction of the Federal Court, under said bill, being invoked upon the sole ground of *diverse citizenship*, which alleged "diversity" upon the face of the pleadings and issues is shown *not in fact to exist.*

See Rec., Vol. 1, pp. 29-32, incl., and 64-79, incl.

Both of the foregoing questions being decided by the Circuit Court of Appeals adversely to petitioners and their bill dismissed (125 Fed. Rep., 657), such decision is therefore final. But it is urged by petitioners that their rights have been invaded under the Fourteenth Amendment to the Constitution of the United States and, notwithstanding the existence of the foregoing statute of March 3, 1891, they have a right to a review by this Court. *Pullman's Car Co.* vs. *Transportation Co., 171 U. S., 138,* and reliance is had for the right to this writ on the case of *Loeb* vs. *Columbia Township Trustees, 179 U. S., 472,* which latter case decides "if a claim is made in the Circuit Court that the State law is invalid under the Constitution of the United States this Court may review the judgment *at the instance of the unsuccessful party.*"

This, however, was a case in which there was an appeal direct to this Court from the Circuit Court, and the Court was considering the construction and effect of the 5th section of the Judiciary Act of March 3d, 1891.

In this case the suit was brought originally in the Circuit Court of the United States for the District of Washington, Northern Division, for the purpose of setting aside a decree of the Probate Court in that State admitting to probate a nuncupative will made by one John Sullivan, and for the purpose of having said will declared void and the Court restrained from making distribution of the estate. The petitioners averred themselves to be British subjects and the respondents citizens of the State of Washington. A decision favorable to the petitioners was rendered by the Circuit Court, from which an appeal was taken to the Court of Appeals for the Ninth Circuit. This Court reversed the decision of the Circuit Court and the case is now here on appeal, for the dismissal of which a motion is now pending, and a motion is submitted by appellants for a writ of certiorari.

It is respectfully submitted this writ ought not to be allowed. First, because it is clearly apparent from the record that the Circuit Court of the United States had no jurisdiction of the case; could not have jurisdiction of the subject-matter from the fact that the probate of wills and the contest between different claimants, both as to the validity of the will and the rights of the heirs, respectively, are subjects wholly within the exclusive jurisdiction of the State Court, and the proceedings are not subject to review in a Federal Court. It is conceded by us that such a review might be had as to the proceedings of Probate Court in *some* of the States, but this is not true in respect to proceedings of that character in the State of Washington. It is submitted that in a State where the

law does not provide for the contest of a will by the Probate Court during the proceedings concerning the probate, but does provide a remedy after probate by a subsequent suit in equity, that then in such a case the Federal Court can have jurisdiction co-ordinate with the State Court, but where, as in the State of Washington, the statutes provide for the hearing and deciding of contests as to the will and rights of heirs, respectively, during probate proceedings, that then the jurisdiction is *exclusive* in State Court, and the Federal Court can not take cognizance.

AUTHORITIES.

THERE IS NO CONFLICT.

By a cursory glance at the authorities one might readily conclude they are in conflict. A very careful examination, however, will show that while there are two classes of cases in reference to proceedings in connection with the contest of a will, there is really no conflict of authorities upon the subject of the jurisdiction of the respective Courts. There is a very clear distinction recognized by the Courts, and running all through the authorities, as to the kind of cases, the jurisdiction of which would be entertained by the Federal Courts.

The distinction between the cases where the Federal Courts have, and have not jurisdiction, is this: If by the laws of the State there is no authority to warrant a contest as to the validity of a will at the time of the probate proceedings, but authority is given by statute to anyone interested in the estate to attack the will by an

independent suit, at any time after its probate, then in the case of diverse citizenship the Federal Court would have jurisdiction. Such was the case, for instance, on which the petitioners mainly rely, that of Richardson, *et al vs.* Greene, *et al*, 61 Federal, 423.

If, however, by the constitution and laws of a State full and complete jurisdiction of all matters of probate, including all contests relating to the validity of wills, is conferred upon the Probate Court of the State, then that jurisdiction is exclusive, and under no circumstances will the Circuit Court of the United States take jurisdiction. We confidently submit that this is the test recognized by the Courts, and the one clearly and properly recognized by the Circuit Court of Appeals in this case.

It is not our intention to go into a long citation or discussion of authorities. We have carefully examined all the authorities cited by the petitioners in the brief filed in support of this petition, and we submit a careful examination of these will sustain our contention.

> Carrau *vs.* O'Callaghan, *et al*, and authorities therein cited.

We call special attention to the citations from the constitution and laws of the State of Washington, set out at length in the opinion of Judge Ross, of the Circuit Court of Appeals, 125 Fed. Rep., 664-665.

From these several provisions it is clearly evident, as we believe, that the Probate Courts of the State of Washington have full, complete and exclusive jurisdiction of all matters, pertaining not only to the probate of wills,

but to contests regarding the validity of wills and the rights of claimants as heirs. If we are correct in this contention and the Court should see it in the same light, of course the application for writ of certiorari must be denied, as the Court would not order a case up on certiorari if fully satisfied the Federal Court was without jurisdiction.

But there is another reason, if the Court had jurisdiction of the subject-matter under proper conditions, why the Circuit Court had no jurisdiction in this particular case; and that is because on the face of the record it clearly appears that other parties, claiming an interest in this estate as heirs, are not made parties to the suit; they were *indispensible* parties; and it is further clearly evident that if they had been made parties the jurisdiction of the Court would have been ousted.

The record shows that Eugene T. Sullivan is on record claiming to be an heir of, and interested in, the estate, as are also several others. The record shows that he was at the beginning of this suit a citizen of the State of Washington. He is in contest, therefore, with Marie Carrau, also a citizen of the State of Washington. He is not made a party to this suit, and he is a *necessary* party, and had he been made a party the jurisdiction of the Court would have been ousted.

It would be impossible that the Court in this case could proceed to a decree without affecting other persons not before the Court, and leaving the controversy in a condition that its final determination might be wholly inconsistent with equity and good conscience. This

Court said in the case of California *vs.* The Southern Pacific Co., 157 U. S., 229:

"Can the Court proceed to a decree as between the State and the Southern Pacific Company, and do complete and final justice without affecting other persons, not before the Court, or leaving the controversy in such a condition that its final termination might be wholly inconsistent with equity and good conscience."

And in this same case, *supra*, this Court held that while the City of Oakland was a *necessary* party, had it been made a party the jurisdiction of the Circuit Court would have been ousted.

Gregory *vs.* Stetson, 133 U. S., 579;
State of California *vs.* S. P. Co., 157, 229;
Carrau *vs.* O'Callaghan, 125 Fed., 657.

Due Process of Law.

The claim is made by petitioners for writ of certiorari that the State Probate Court had no jurisdiction of the parties or of the subject-matter in admitting to probate the nuncupative will, and that a distribution of the estate under the decree of the Probate Court, and which the bill in this case sought to restrain, would deprive the petitioners of their property without due process of law. But it is respectfully submitted if the Probate Court was wholly without jurisdiction then the judgment and decree of the Court is absolutely void. No decree of distribution issued in pursuance of such a decree can have any effect whatever, but is open to attack whenever and wherever its validity is relied upon.

The rights of the petitioners could not be affected by any action taken under a decree that is void for want of jurisdiction. It can not be said that property taken under and in pursuance of such a decree has been taken without due process of law; in fact, it has not been taken at all, and property distributed under such a decree can be recovered back by the petitioners by a proceeding in the State Court by showing that the decree as to the contest between claimants was without jurisdiction and void. It is submitted property taken under a void decree is not taken at all, much less taken without due process of law. An inspection of the record, however, shows clearly that the Probate Court had jurisdiction of the persons and of the subject-matter. It was not a proceeding *inter-partes* but a special proceeding in the nature of a proceeding *in rem*, and the record shows that the statutes of the State were fully complied with.

The petition for certiorari should be disallowed and the appeal should be dismissed.

W. F. Hays,
John H. Mitchell,
Attorneys for Respondents.